

# The Right To Bear Arms: A Disfavored Right

By ANTHONY P. PICADIO,<sup>1</sup> Allegheny County  
Member of the Pennsylvania Bar



## TABLE OF CONTENTS

INTRODUCTION .....	17	SCALIA'S BLINDERS .....	22
THE <i>HELLER</i> DECISION .....	18	ORIGINALISM'S FATAL FLAW .....	24
VIRGINIA'S SLAVE PROBLEM .....	19	RECENT SECOND AMENDMENT	
VIRGINIA'S MANAGEMENT OF ITS		JURISPRUDENCE .....	24
SLAVE PROBLEM .....	20	FINAL THOUGHTS .....	25
THE GREAT DEBATE .....	20	AN ALTERNATIVE ANALYSIS .....	25
DRAFTING THE SECOND			
AMENDMENT .....	21		

## ABSTRACT

*In 2008, in the case of District of Columbia v. Heller,<sup>2</sup> the United States Supreme Court in a 5 to 4 decision, for the first time held that the Second Amendment granted an individual right to own and possess a firearm unconnected to service in a militia. Although the right recognized in Heller was limited (right to keep a handgun in the home for the purpose of self-defense), the decision left many questions open regarding the permissible scope of gun regulation. In the ensuing decade, to the disappointment of many gun rights advocates and the pleasant surprise of many gun control advocates, there has been no expansion in the Supreme Court of the limited right recognized in Heller. In fact, the Supreme Court has routinely denied petitions for allowance of appeal from decisions upholding various forms of gun regulation, leaving those regulations standing. This article suggests that perhaps one reason Heller has not been extended is the increasing recognition that the majority opinion was based on a flawed reading of history.*

*The majority opinion in Heller was written by Justice Scalia and was based on his conclusion that the right to own a firearm for self-defense purposes preexisted the adoption of the Second Amendment and was understood to be included among the rights created by that Amendment. This article shows that this conclusion was based on an erroneous reading of colonial history and the drafting history of the Second Amendment. This article takes the position that even if a right to own a firearm for self-defense purposes preexisted the Bill of Rights, it*

1. Anthony P. Picadio is a graduate of the University of Pittsburgh School of Law. His practice has been concentrated in the fields of Environmental Law and Commercial Litigation. He is a founder of the Pittsburgh firm Picadio Sneath Miller and Norton which, effective January 2018, was merged into the Pittsburgh firm Houston Harbaugh. Mr. Picadio is now of counsel to that firm.

2. *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

*was not understood by the drafters and a number of ratifying states to be included within the Second Amendment. This article shows that if the Second Amendment had been understood to have the meaning given it by Justice Scalia, it would not have been ratified by Virginia and the other slave states.*

*Prior to independence, the southern slave holding colonies such as Virginia and the Carolinas used their militias as slave patrols to detect and suppress nascent slave uprisings. Militias were open only to white males. When Virginia and the other slave states voted to ratify the Second Amendment, they understood that it connected the right to keep and bear arms to service in their all white militias. They would never have ratified the Second Amendment if it could have been interpreted as creating an individual constitutional right in free blacks to own or possess a firearm.*

## INTRODUCTION

On February 20, 2018, the Supreme Court declined to accept an appeal from a decision of the Court of Appeals for the Ninth Circuit, upholding California's 10-day waiting period for gun purchases. Gun owners had challenged the waiting period on the grounds that it impermissibly infringed on the Second Amendment's right to keep and bear arms.

Justice Clarence Thomas filed a dissent contending that the Supreme Court should have accepted the appeal. In his dissent, he criticized what he said was the:

failure [of Courts] to afford the Second Amendment the respect due an enumerated constitutional right . . . If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.<sup>3</sup>

**Since *Heller*, the Supreme Court has given state and local governments a free rein in enacting a wide range of restrictive gun regulations. This is as it should be, given *Heller's* erroneous holding.**

The "continued inaction" Justice Thomas was referring to was the repeated failure of the Supreme Court to accept an appeal from a decision of a Court of Appeals upholding a restriction on gun ownership. According to Justice Thomas, the Supreme Court's failure to accept appeals in Second Amendment cases had encouraged the lower federal courts to defy the Constitution's Right to Bear Arms.

It is certainly true that since the Court's landmark opinion in *District of Columbia v. Heller* (2008) which, for the first time, held that the Second Amendment protected an individual's right to own a gun unconnected with service in a militia, the Supreme Court has declined to hear numerous appeals—over 88—challenging restrictions on gun ownership.<sup>4</sup> It is also true that since *Heller* was decided, a wide range of restrictions on gun ownership and use have been upheld by the lower federal courts.<sup>5</sup> Viewing this body of case law in its entirety, one can easily agree with Justice Thomas that the right to bear arms is indeed a disfavored right. In fact, it is barely a right at all. To understand why this is so, one needs to understand the rea-

3. *Silvester v. Becerra*, 138 S.Ct. 945 (mem) (2018).

4. Giffords Law Center: [lawcenter.giffords.org/Protecting\\_Strong\\_Gun\\_Laws: The Supreme Court Leaves Lower Court Victories Untouched](http://lawcenter.giffords.org/Protecting_Strong_Gun_Laws:_The_Supreme_Court_Leaves_Lower_Court_Victories_Untouched) (October 16, 2018 update).

5. These cases are collected in the article cited in note 4, *supra*, which is current through October 16, 2018.

soning which led a majority of the justices in *Heller* to uphold an individual's right to bear arms and to understand the historical background in which the Second Amendment was adopted.

## THE *HELLER* DECISION

The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

For most of our country's existence, the Second Amendment was not interpreted as conferring on any individual the right to bear arms for purposes unconnected to service in a militia. For years, the leading judicial authority on point was *United States v. Miller* (1939),<sup>6</sup> in which the United States Supreme Court said:

In the absence of any evidence tending to show that possession or use of [a firearm] at this time has some reasonable relationship to the preservation . . . of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

*Miller's* pronouncement stood as the last word on the meaning of the Second Amendment until 2008, when the Supreme Court revisited the issue. In *District of Columbia v. Heller*, the Court, for the first time, held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia.

The District of Columbia had enacted a firearm regulatory scheme that totally prohibited the possession of an operable handgun in a home. A 5 to 4 majority of the Supreme Court, in an opinion written by Justice Scalia, declared DC's firearm regulatory scheme unconstitutional to the extent that it prohibited possession of an operable handgun in a home for self-defense purposes.

To get to this result, Justice Scalia had to detach the first clause of the Amendment ("A well regulated militia, being necessary to the security of a free state") from the second clause ("the right of the people to keep and bear arms, shall not be infringed"). Justice Scalia did this by designating the first clause as the "prefatory" clause and the second as the "operative" clause.<sup>7</sup> As such, according to Justice Scalia, the prefatory clause had no operative effect but was merely a statement of purpose which was consistent with, but which did not limit, the operative clause:

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.<sup>8</sup>

Thus, in two sentences the bond was broken and the right to bear arms became liberated from its long-standing attachment to service in a militia. The Scalia analysis is demonstrably wrong and has expanded the potential scope of the Second Amendment well beyond what James Madison, the principal drafter, and the State of Virginia, the final ratifier, intended.

6. *United States v. Miller*, 307 U.S. 174 (1939).

7. *Heller*, *supra* note 2 at 2789.

8. *Heller*, *supra* note 2 at 2801.

## VIRGINIA'S SLAVE PROBLEM

James Madison was a Virginia slave owner, as were President George Washington and Thomas Jefferson, Washington's Secretary of State. Their great fear—a fear shared by all other Virginia planters and public officials—was a ruinous slave rebellion in which their families would be slaughtered and their property destroyed. This fear was especially acute when Virginia ratified the Bill of Rights on December 15, 1791.

When Virginia voted to ratify the Bill of Rights, a slave rebellion was in full force in the French West Indies Colony of Saint-Domingue (later Haiti).<sup>9</sup> The Virginia planters, including Jefferson, George Mason, and many other prominent Virginians, feared that this rebellion would swiftly spread to the slave holding states in the U.S. This was not just an idle fear, for Virginia had a long history of attempted and aborted slave uprisings.

A widespread slave rebellion in Virginia's northern neck was crushed in 1687 and its leaders executed. Similar rebellions were also crushed in 1644, 1660, 1663, 1709, 1710, and 1730. The 1730 uprising was known as the Norfolk Conspiracy and encompassed five Virginia counties.<sup>10</sup>

Adding fuel to this fire was the Dunmore proclamation of 1775, in which the Royal Colonial governor of Virginia promised freedom for slaves of American revolutionaries who left their owners and joined the royal forces. The proclamation prompted a flood of slaves to run away and enlist with Dunmore on the side of England.<sup>11</sup> In 1779, British General Sir Henry Clinton issued the Philipsburg Proclamation, which freed slaves owned by revolutionaries throughout the rebel states, even if they did not enlist in the British Army. It is estimated that as a result of these proclamations over 100,000 slaves attempted to leave their owners and join the British. An underlying goal of these proclamations was to provoke a general slave insurrection in the hope of inducing the patriots to abandon the revolution.<sup>12</sup> These proclamations left slaves feeling that their best chance for eventual emancipation was with Britain, and the American victory in 1783 was no doubt a disappointment to many Virginia slaves.

In an apparent effort to relieve this disappointment and to hold out some hope of freedom to Virginia slaves, Virginia enacted the 1782 Slave Law entitled "Act to Authorize the Manumission of Slaves." Under this act, a slave could be emancipated by his owner at his death or, during the owner's lifetime, through a deed of manumission. The act required any owner who freed a slave to continue to be responsible for financial support.<sup>13</sup>

---

9. The Haiti slave rebellion began on August 22, 1791, but was preceded by many months of unrest. See, *Haitian Revolution*, Wikipedia. Virginia ratified the Bill of Rights on December 15, 1791, becoming the final necessary state for ratification of the Bill of Rights. See "Bill of Rights Finally Ratified," History.com/this-day-in-history/bill-of-rights-is-finally-ratified.

10. For more detailed discussion of suppressed slave rebellions in Colonial Virginia, see: Mary Miley Theobald, "Slave Conspiracies in Colonial Virginia," Colonial Williamsburg Official History, GW Journal, Winter, 2005-06; www.history.org

11. See "Dunmore's Proclamation, a Time to Choose," Colonial Williamsburg Official History, www.history.org. See also, Dunmore's Proclamation, Wikipedia ("During the course of the war 80,000–100,000 slaves escaped from plantations.")

12. The Dunmore and Phillipsburg Proclamations have been referred to as emancipation proclamations, placing Britain at the forefront of the abolition movement. Tom Burke, "The First Emancipation Proclamation," West Roxbury Patch, Jan. 24, 2013. See also, "The Philipsburg Proclamation (June 30, 1779)," *The American Revolution*, www.ouramericanrevolution.org.

13. Laws of Virginia, May 1782 (Vol. XI, Chapt. VIII, *Hening's Statutes at Large*, pp. 23-41) www.Vagenweb.org. As many as 21 slaves were freed under this law in one year in the city of Philipsburg alone. Luther P. Jackson, *Manumission in Central Virginia Cities*, *The Journal of Negro History*, Vol. 15, No. 3 (Jul. 1930) pp. 278-314.

Many slaves were freed under this act, causing the number of black “freemen” in Virginia to rapidly expand. The number of free blacks in Virginia became so great that in 1806 Virginia amended the act to require all free black slaves to leave the state within 18 months or be taken back into slavery.<sup>14</sup> Free blacks were considered to present a threat to the established order because of the belief that they would be inclined to provide assistance to any slave uprising.

## VIRGINIA’S MANAGEMENT OF ITS SLAVE PROBLEM

Virginia managed its slave rebellion risk in two ways. First, it deprived slaves of weapons. Second, it policed slave holding areas with militias directed to be on the lookout for slave conspiracies.

Regarding weapons, both slaves and free blacks were prohibited from owning weapons from an early date in Virginia. For example, in 1640, a Virginia law imposed a total firearms ban, including for self-defense, on all “Negroes, slaves and free . . .” Similar total bans were enacted in 1640 and 1712 (“An Act for Preventing Negroe Insurrections”). At some point, restrictions on possession of firearms was loosened for free blacks in some areas to permit them to possess a firearm for defense of their home, but only if they were able to obtain a permit from the county sheriff, which was revocable. Free blacks never had the same access to firearms as white men had in Colonial Virginia.<sup>15</sup>

The other means to manage the risks of slave rebellion used in pre-Bill of Rights Virginia, and the other southern slave states, was the militia. Generally, white males between the ages of 18 and 45 were required to serve in the militias. (In Virginia, free blacks could join, but only as drummers or buglers. In South Carolina, free blacks were not permitted to join.) These militias were known as “slave patrols” and made periodic inspections of “all Negro houses for offensive weapons and ammunition.” In the southern colonies “well regulated militias” kept slaves in their place. They were used to prevent and put down slave uprisings. White control of the militias was essential for the maintenance of the slave economies of the southern colonies.<sup>16</sup>

## THE GREAT DEBATE

When the Constitution was initially passed by the Constitutional Convention and submitted to the states for ratification, it did not contain a bill of rights. The twice-elected governor of Virginia, Patrick Henry, strongly opposed ratification because he believed, among other shortcomings, that the Constitution, in Article 1, Section 8, gave the federal government the power to control state militias which he was sure would be used to strip the slave states of their slave-patrol militias.

In part, Article 1, Section 8 of the Constitution gave to the federal government the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

14. See Dumas Malone, Jefferson and his time: *The Saga of Monticello*, Boston: Little Brown and Company, Vol. 6, p. 311(1981). This law had the effect of discouraging slave owners from freeing their slaves. “Jefferson and other shareholders considered (the 1806 law) an impediment to freeing their human property.” “The laws do not permit us to turn [our slaves] loose,” wrote Jefferson in 1818 [because the freed slaves were forced to leave the State].

15. Carl T. Bogus, “The Hidden History of the Second Amendment,” 31 U.C. Davis Law Rev. 309 (Jan. 1998). Carl T. Bogus “Second Amendment in Law and History,” 76 Chicago-Kent Law Rev. 3 (2000).

16. Sally E. Haden, “Slave Patrols” (Harvard University Press, 2001), pp. 14-40.

At the Virginia Ratifying Convention in 1788, Patrick Henry, considered the most persuasive speaker in the Colonies, put his opposition to ratification in these words:

Let me here call your attention to that part [Article 1, Section 8] which gives Congress power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. . . . By this sir, you see that their control over our last best defence is unlimited.<sup>17</sup>

The 10th section of the 1st article . . . says, that ‘no state shall engage in war, unless actually invaded. . . .’

If the country be invaded, a state may go to war, but cannot suppress [slave] insurrection. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress.<sup>18</sup> (Emphasis added)

Henry had many other objections to ratification of the Constitution and led the debate against Virginia ratification with the able assistance of George Mason.

James Madison led the debate in favor.<sup>19</sup> The debate took place over three weeks. It was without a doubt the most consequential debate in our history, because if Virginia declined to ratify the Constitution, at least three other holdouts, including New York, were expected to follow suit. Thus, the very existence of the United States of America, as we know it, was at stake in this debate.

Ultimately, Madison won the debate, and Virginia ratified (89-79).<sup>20</sup> Shortly afterward, Madison ran for election as a representative to the First United States Congress. Patrick Henry attempted to have him defeated by gerrymandering the district and running James Monroe to oppose Madison. Madison won the election, but only after making a campaign pledge to submit amendments to the Constitution to explicitly protect certain rights against infringement by the federal government, including the right of states to control their militias.<sup>21</sup>

## DRAFTING THE SECOND AMENDMENT

In the first draft of what became the Second Amendment, Madison wrote:

The right of the people to keep and bear arms shall not be infringed: a well armed, and well regulated militia being the best security of a free country but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person. [Emphasis added].<sup>22</sup>

But Patrick Henry, George Mason and others wanted clear language preserving the state slave-patrol militias from federal interference. To accommodate them, Madison changed the language to read this way:

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed. (Emphasis added).<sup>23</sup>

17. Henry's opening speech to the convention, "*Speech Before Ratifying Convention*," [teachingamericanhistory.org/library/document/Patrick-henry-virginia-ratifying-convention-Va/](http://teachingamericanhistory.org/library/document/Patrick-henry-virginia-ratifying-convention-Va/).

18. Notes of the debate. See, "*Debate in Virginia Ratifying Convention, The Founders' Constitution*, Article 4, Section 4," Document 9, Elliot 3: 417-28 ([press-pubs.uchicago.edu/foundersdocuments/94-459.html](http://press-pubs.uchicago.edu/foundersdocuments/94-459.html)).

19. For a general discussion of the debate, see Ralph Ketchum, *James Madison*, University Press of Virginia, Charlottesville and London, 2000, pp. 254-264.

20. After the debate John Marshall reportedly said that Patrick Henry was the most persuasive speaker he had known but James Madison was the most convincing. William Wirt, 2 Patrick Henry: Life and Speeches, 376.

21. Robert L. Leight, "*James Madison victim of gerrymandering before it was called that*," The Morning Call, [www.mcall.com](http://www.mcall.com), January 11, 2018.

22. First Draft of the Bill of Rights, [www.sethkaller.com](http://www.sethkaller.com)

23. This language tracked the language of Section 13 of Virginia's Bill of Rights, which had been drafted by George Mason. See *supra* note 19, above.

This provision was included as the fourth of twelve articles submitted by Congress to the states for ratification. On December 15, 1791, in the midst of the largest and most violent slave insurrection in history, which was then underway in San Domingue (now Haiti), Virginia voted to ratify all of the proposed articles. Virginia's vote brought the total number of votes for articles three through twelve to the number required to ratify those articles. As a number of states failed to ratify the first and second Articles the proposed fourth article became the Second Amendment in the final ten which became the Bill of Rights.

## SCALIA'S BLINDERS

As pointed out above, Justice Scalia's majority opinion in *Heller* separated what he called the "operative" clause in the Amendment from what he called the prefatory clause and held that the operative clause stood on its own and was not limited by the prefatory clause. To accept Justice Scalia's analysis, one would have to believe that Virginia (and the five other slave states) voted to ratify a provision which gave a right to bear arms to free blacks. Given the anxiety among whites regarding the powder keg of slavery and the great fear of a slave rebellion, any provision that had the potential of arming blacks, even free blacks, would have been soundly defeated. However, southern whites were fine with a provision that connected the right to bear arms to membership in a state militia, because only white males could belong to a state militia and bear arms in Virginia and other slave states.

Strong evidence that Virginia would never have ratified a constitutional provision giving free blacks the right to bear arms was staring Justice Scalia in the face when he wrote his opinion.

In 1776, shortly before he wrote the Declaration of Independence, Thomas Jefferson wrote a draft constitution for the State of Virginia and submitted it to Virginia officials for their consideration. Jefferson's draft contained this provision:

No freeman shall ever be debarred the use of arms within his own lands or tenements.

In an earlier draft Jefferson had provided for this broader right:

No freeman shall ever be debarred the use of arms.

At the time he was drafting a provision for a Virginia Constitution, he was in Philadelphia attending the Continental Congress and was in touch with the other Virginia congressional representatives. It is likely that they discouraged him from including the broader version in his draft because the draft which he sent to Virginia (George Wythe, his teacher and fellow Virginia representative delivered it) contained the narrower provision limiting the constitutional right to bear arms to one's own lands or tenements. Wythe arrived after the committee charged with drafting a constitution for Virginia had produced a draft which included many provisions submitted by George Mason. However, after the arrival of Wythe, the Committee reopened the matter and gave full consideration to Jefferson's draft, incorporating a number of its provisions. As one writer put it: "The Committee incorporated as much as it dared of Jefferson's draft."<sup>24</sup> The Committee did not accept Jefferson's provision giving freemen the constitutional right to use arms for self-defense in the home, and the Virginia Constitution as adopted failed to contain any protection of

---

24. A discussion of the extent to which Jefferson's draft was considered and adopted by the Committee can be found at: Founders Online, "Editorial Note: The Virginia Constitution," [founders.archives.gov](http://founders.archives.gov).

the right to bear arms unconnected to service in the militia.<sup>25</sup> In other words, the very constitutional right Justice Scalia found in the Second Amendment in *Heller*—the right to keep a handgun in one's home for self-defense without regard to membership in a militia—had been rejected by Virginia in the decade preceding the drafting of the Second Amendment. Why was it rejected? For the obvious reason that by applying to every “freeman” it would have given to free blacks the constitutional right to have firearms.

What did Justice Scalia have to say about Virginia's rejection of Jefferson's proposed provision? He ignored it. He merely stated:

Other states did not include rights to bear arms in their pre-1789 constitutions—although in Virginia a Second Amendment analogue was proposed (unsuccessfully) by Thomas Jefferson. (It read: ‘No freeman shall ever be debarred the use of arms [within his own lands or tenements].’<sup>26</sup>

Scalia then just skipped over<sup>27</sup> the issue, making no effort to explain why Virginia's rejection of Jefferson's proposed “Second Amendment analogue” was not strong evidence that Virginia would never have ratified the Second Amendment as interpreted by his majority opinion in *Heller*. In fact, Virginia's rejection of the Jefferson proposal is very strong evidence that Virginia would have rejected Scalia's interpretation.<sup>28</sup> What is surprising is that Scalia managed to attract the votes of Justices Kennedy, Alito and Thomas, and Chief Justice Roberts to obtain the majority he needed in *Heller*.

In a subsequent case (*McDonald v. City of Chicago*),<sup>29</sup> Justice Alito conceded that the Scalia historical analysis could be wrong, but saw no need to revisit it:

[W]hile there is certainly room for disagreement about *Heller's* analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.<sup>30</sup>

---

25. The final draft of the Virginia Constitution as adopted, contained this provision: “13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State. . .” This provision was suggested by George Mason, a slave owner, and in large part, adopted by Madison when he drafted the Second Amendment. See also, *Heller*, *supra* note 2 at 2835 (Stevens' dissent).

26. *Heller*, *supra* note 2, at 2803. Justice Scalia cited to “1 The Papers of Thomas Jefferson 244 (J. Boyd ed. 1950).”

27. Scalia also skipped over the fact that other southern states, specifically Georgia and North Carolina, seemed to limit the right to bear arms to membership in a militia. *Heller*, *supra* n.2, at 2802.

28. Some might argue that free blacks were not considered citizens as was held by the Supreme Court 66 years later in *Dred Scott v. Saunders*, 60 U.S. 393 (1857); and that therefore, there existed no risk that the Second Amendment would apply to them. However, at the time Virginia voted to ratify the Bill of Rights, six northern states had already voted to abolish slavery (Pennsylvania, New Hampshire, Massachusetts, Rhode Island, Connecticut and Vermont). See Forner, Eric, “The Fieri Trial: Abraham Lincoln and American Slavery”. New York: W.W. Norton&Company, Inc., pg. 14 (2010). Moreover, at the time the Articles of Confederation were adopted by the Continental Congress in 1777, five Colonies (New Hampshire, Massachusetts, New York, New Jersey and North Carolina) considered free blacks to be citizens who, providing they met the generally applicable voting requirements, were entitled to vote. See Justice Benjamin Robbins Curtis' dissent in *Dred Scott v. Saunders*. In this political environment, the slave states were highly unlikely to place the issue of gun ownership by free blacks into the hands of the federal government.

29. *McDonald v. Chicago*, 561 U.S. 742 (2010) held that the Second Amendment right of an individual to keep and bear arms is a fundamental right which is incorporated into the Due Process Clause of the Fourteenth Amendment and therefore applies to the States. After so holding, the *McDonald* Court remanded the case back to the 7th Circuit Court of Appeals. The case involved a challenge to Chicago's gun registration law to the extent that it precluded registration of handguns. The Supreme Court did not rule on the merits of the challenge.

30. *McDonald*, 561 U.S. at 788.

He then went on to restate the holding of *Heller* in the narrowest of terms:

In *Heller* we held that the Second Amendment protects the right to possess a handgun in the house for the purpose of self-defense.<sup>31</sup>

## ORIGINALISM'S FATAL FLAW

Justice Scalia, of course, was one of the most forceful proponents of originalism as a method of constitutional interpretation. In his words: “The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated.”<sup>32</sup> He applied this theory of interpretation in *Heller*, referring to his interpretation as “the original understanding of the Second Amendment.”<sup>33</sup> And, as pointed out above, Justice Alito, in his majority opinion in *McDonald*, referred to *Heller* as a case involving “original meaning”<sup>34</sup> of the Second Amendment.

The problem with the original meaning theory of interpretation is that it assumes that there was one commonly understood meaning across the populations of the original states. *Heller* and the analysis set forth in this article, illustrate the fallacy of this assumption. The word “militia” in the South meant a “whites only” organization that was used as a slave patrol. Militia did not have the same meaning in the northern states. This regional difference, along with differing views on slavery, and the rights of free blacks, gave the Second Amendment different meanings in different states. In such a context, originalism, as a theory of constitutional interpretation, just does not work. This is because there is no common “original meaning.”<sup>35</sup>

Justice Scalia, being faced with Virginia’s rejection of Jefferson’s proposed “Second Amendment analogue,” and with the differing approaches to gun rights taken in state constitutions,<sup>36</sup> had a choice. He could give up his long-held originalist theory of interpretation and recognize that there was no single original meaning that was commonly held throughout the ratifying states, or he could fudge it and find a single original meaning when one did not, in fact, exist. He chose the latter course.

## RECENT SECOND AMENDMENT JURISPRUDENCE

Since *Heller* was decided, and as of October 18, 2018, there have been over 1,310 Second Amendment cases nationwide, challenging restrictive gun laws, with the overwhelming majority (93%) upholding these restrictions.<sup>37</sup> The Supreme Court was petitioned to accept an appeal in 88 of those cases and in each case the Court declined to hear the appeal.<sup>38</sup>

31. *Id.*, at 791.

32. *See*, A. Scalia, “A Theory of Constitutional Interpretation,” speech at Catholic University of America, October 18, 1966. Quoted in “Originalism,” Wikipedia.

33. *Heller*, *supra* note 2, at 2816.

34. *McDonald*, 561 U.S. at 788.

35. For a more comprehensive criticism of originalism in Second Amendment interpretation, *see* Faber, Daniel A., “Disarmed by Time: The Second Amendment and the Failure of Originalism,” 76 Chi-Kent Law Rev. 167 (2000).

36. Prior to the ratification of the Bill of Rights, Pennsylvania and Vermont had adopted state constitutional provisions that granted an individual right to bear arms unconnected to service in a militia. On the other hand, North Carolina and Georgia adopted constitutional provisions which appear to connect the right to service in a militia. *See*, *Heller*, *supra* note at 2802-03 (citation omitted).

37. Giffords Law Center, *supra* note 4.

38. The last Second Amendment case in which the Supreme Court heard argument was *McDonald*, which was decided on June 28, 2010. The only second Amendment case even considered by the Court since *McDonald* was *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*) which simply vacated and remanded the Massachusetts Supreme Court decision upholding a stun gun ban and directed the Court to apply *Heller*. *Id.*

Among the cases left standing by the Supreme Court are the following:

*Peruta v. California*,<sup>39</sup> in which the Ninth Circuit Court of Appeals held that the Second Amendment does not protect the right to carry concealed firearms in public;

*United States v. Mahin*,<sup>40</sup> in which the Fourth Circuit Court of Appeals upheld a federal law prohibiting persons subject to domestic violence restraining order from possessing firearms;

*Kolbe v. Hogan*,<sup>41</sup> in which the Fourth Circuit Court of Appeals held that assault weapons and large capacity magazines are not protected by the Second Amendment;

*Justice v. Town of Cicero*,<sup>42</sup> in which the Seventh Circuit Court of Appeals upheld a local law requiring registration of all firearms.

These are only a few of the many restrictive Second Amendment decisions the Supreme Court has left stand after the *Heller* decision.

The history of the Second Amendment in the courts since the *Heller* decision does in fact support Justice Thomas' lament that the courts have failed to afford the Second Amendment "the respect due an enumerated constitutional right." Perhaps one of the reasons that the Amendment has been so disfavored by the courts is a growing recognition that it was never intended by those who drafted and adopted it to grant any rights to own or use a firearm unconnected to membership in a militia.

## FINAL THOUGHTS

Justice Scalia devoted a large part of his opinion to an attempt to show that the right to use a firearm to defend one's home pre-dated the United States Constitution and was widely accepted both in England and the Colonies for many years before Independence. His claim that colonial history as well as English history supported his conclusion that the right to bear arms for self-defense in the home pre-existed the ratification of the Bill of Rights has been seriously disputed, not only in Justice Stevens' dissenting opinion, but also by a number of respected scholars.<sup>43</sup> It is not the purpose of this paper to argue either side of that dispute. Rather, the point made here is that even if a right to bear arms to defend one's home did pre-exist the ratification of the Bill of Rights, that pre-existing right was not understood as being incorporated into the Second Amendment as an enumerated right by its principal drafter and by a number of the states that ratified the Bill of Rights.

## AN ALTERNATIVE ANALYSIS

There are certainly rights which predated the Constitution and are not enumerated in it or in the Bill of Rights, such as the right to marry and the right to have children. The right to keep firearms for self-defense of one's home may very well be one of them, but that right was not evenly distributed. Southern Colonies denied the

39. *Paruta v. California*, 824 F.3d 919 (9th Cir. 2016) (*en banc*), (*cert. denied*), 582 U.S. \_\_\_\_ (2017), No. 16-894 (June 26, 2017).

40. *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012).

41. *Kolber v. Hogan*, 813 F.3d 160 (4th Cir. 2016).

42. *Justice v. Town of Cicero* (III), 577 F.3d 768 (7th Cir. 2009), (*cert. denied*) 130 S. Ct. 3410 (2010), (*reh. denied*) 131 S. Ct. 46 (2010).

43. See, Richard A. Posner: "In Defense of Looseness," *The New Republic*, August 27, 2008. Judge Posner criticizes the majority opinion in *Heller* as being based on "law-office history"—one designed to support a preconceived result—rather than on the disinterested analyses of professional historians.

right to free blacks<sup>44</sup> and in at least one colony—Maryland—it was, for a time, denied to Catholics (as it was in England).<sup>45</sup> This history shows that, at least in a number of states and in England, there was an understanding that the government had the power to restrict the use of firearms to certain preferred classes of citizens and to keep them from less favored classes. So, it is a complicated picture. It would, however, have been better, and more intellectually honest, if Justice Scalia had analyzed the *Heller* case under the Ninth Amendment, which provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The right acknowledged in *Heller* was not originally understood to be an enumerated right but, perhaps, the *Heller* decision may have received more respect if it had forthrightly acknowledged such, and then analyzed the issue under the Ninth Amendment.<sup>46</sup> Viewing the right to possess a firearm in one’s house for self-defense as a pre-existing and not as an enumerated right, would more clearly confine the right to the house and eliminate the potential for expansion into public places.

One thing is clear, however. The pre-existing right that the *Heller* Court incorporated into the Second Amendment is very narrow. As recognized by Justice Alito in the *McDonald* case, it protects only “the right to possess a handgun in the house for the purposes of self-defense.”<sup>47</sup> This narrow right has never been extended by the Supreme Court. So, the next time you hear a politician say: “I believe in the Second Amendment,” you now know that he/she believes in very little.

---

44. See authorities cited *supra*, n.15.

45. The English Declaration of Rights of 1689 limited the right to have arms to Protestants. *Heller*, *supra*, note 2 at 2798; Patrick Charles, *The Faces of the Second Amendment Outside the Home: History Versus a Historical Standards of Review*, 60 Cleveland State Law Review 1, 27-28 (2012). After Colonial Maryland officially adopted the Anglican Church as the state church in the 18th Century, it adopted laws which forbade Catholics to vote and to bear arms. This situation appears to have continued until Independence. 14 Catholic Lawyer, Winter 1968, p. 15.

46. The Supreme Court has never based a constitutional right exclusively on the Ninth Amendment. The closest it has come is *Griswold v. Connecticut*, 381 U.S. 479 (1965) which held that a Connecticut law criminalizing the use of contraceptives violated the right of marital privacy. The Ninth Amendment was one of several Amendments mentioned in Justice Douglas’ majority opinion (7-2) as recognizing such a privacy right. Justice Goldberg wrote a concurring opinion in which two other Justices joined, stating:

“[A]s the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgement by the Government though not specifically mentioned in the Constitution.”

*Griswold*, 381 U.S. at 496. If there was ever a case that cried out for analysis under the Ninth Amendment, it was *Heller*.

47. *McDonald*, 561 U.S. at 791.